PANG SOO

v.

TONG AH COMPANY SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[CIVIL SUIT NO: S1-22-261-2002]
20 OCTOBER 2009

TORT: *Negligence - Maintenance of tree - Plaintiff suffered serious spinal injuries after being struck by a tree that fell from defendant's land - Duty of care - Test of reasonableness - Volenti non fit injuria*

TORT: *Nuisance - Tree falling onto highway - Plaintiff suffered serious spinal injuries after being struck by a tree that fell from defendant's land - Natural user of land*

This was a claim in negligence and nuisance by the plaintiff against the defendant. The plaintiff was a vegetable seller who sold his vegetables by hawking in a small van. He suffered serious spinal injuries as a result of being struck by a tree that had fallen from the defendant's land, which fronted the side of the road on which he had parked his van. It was the plaintiff's contention that the defendant ought to have conducted regular examinations of the state of the tree which would have revealed that there was erosion at the base of the tree causing it to be unsafe. The defendant, however, denied that it was negligent in allowing the tree to become unstable and diseased as to cause danger to persons using the road, and attributed the uprooting to an act of God *ie*, the strong wind that blew at the material time.

Held (dismissing the claim with costs):

(1) The probable cause of the uprooting of the tree was the erosion of the land area at the root of the tree. There was clearly a duty on the part of the defendant to ensure that there was no such erosion, which it had breached by failing to properly inspect the condition of the trees on its land on an orderly basis. Had that been done the erosion could have been detected and preventive measures taken where necessary. The defence of act of God by reason of the exceptionally strong wind, even if

A true, would not be available to the defendants given that the uprooting was caused by the defendant's failure to prevent erosion. (paras 22 & 23)

(2) The plaintiff, however, was not an ordinary and legitimate user B of the road for the purpose of travel. He was using that part of the road to park his van from where he would sell his vegetables on a daily basis, and, by his own account, was struck by the fallen tree after he had finished selling and was getting into the van to drive off. It would be most unreasonable under C the circumstances to find that a duty of care existed on the landowner's part to ensure that the tree would not fall at any point of time while the plaintiff conducted his business. It would not satisfy the reasonableness test in *Caparo Industries plc v. Dickman & Ors*. Quite apart from an absence of a duty of D care, the separate defence of *volenti non fit injuria* should be available to the defendant. A person who habitually parks himself in an area where high trees abound ought to be aware and know that there is always a danger that a tree may fall on him at any given time. By continuing to sell his vegetables E from his van at the same place on a regular basis, the plaintiff was to be taken as having assumed such a risk. The plaintiff's action in negligence, therefore, must fail. *Thean Chew v. The Seaport (Selangor) Rubber Estate Ltd* (refd); *Caparo Industries plc v. Dickman & Ors* (foll). (paras 24 & 25)

F **(3)** It was clear that the nuisance complained of in the instant case arose from a natural user of land as it was not subjected to any use or activities. Thus, the plaintiff's claim in nuisance must also fail. *Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Ors* (foll); *Leakey and Others v. National Trust for* G *Places of Historic Interest or Natural Beauty* (refd). (para 26)

Case(s) referred to:

Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors [2003] 1 CLJ 585 CA ***(refd)***

H *Caparo Industries plc v. Dickman & Ors [1990] 1 All ER 568* ***(foll)***

Leakey and Others v. National Trust for Places of Historic Interest or Natural Beauty [1980] 1 All ER 17 ***(refd)***

Quinn v. Scott And Another [1965] 2 All ER 588 ***(refd)***

Thean Chew v. The Seaport (Selangor) Rubber Estate Ltd [1960] 1 LNS 152 HC ***(refd)***

I *Wu Siew Ying v. Gunung Tunggal Quarry & Construction Sdn Bhd & Ors [1999] 4 CLJ 339 HC* ***(foll)***

Legislation referred to:
Civil Law Act 1956, s. 3

Other source(s) referred to:
Charlesworth on Negligence, 3rd edn, p 147
Clerk & Lindsell on Tort, 1995, 17th edn, para 18-17

For the plaintiff - Shamini Navaratnam; M/s Siva Dharma & Assocs
For the defendant - KH Yeap (R Sunitha & Zolkapeli Amir with him); M/s Koh & Assocs

Reported by Suresh Nathan

JUDGMENT

Kang Hwee Gee J:

Plaintiff's Claim

Negligence And Nuisance

[1] Parties are agreed that this trial should be restricted to the issue of liability leaving damages to be assessed by the Registrar if liability is proved.

The Following Facts Are Not Disputed

[2] The plaintiff was a vegetable seller who sold vegetables by hawking them in a small van. The plaintiff suffered injury as a result of being struck by a tree which had fallen from the defendant's land which fronted the side of the road on which he had parked his van.

[3] He had just finished selling for the day and was in the process of leaving the place. As he was about to enter his van, a tree was suddenly uprooted from the defendant's land and a branch thereof struck him causing him to suffer serious spinal injuries. The tree was about 70 feet high and situated 56 feet from the place where the plaintiff had parked his van.

The Plaintiff's Case

[4] The plaintiff relied on the evidence of a forestry expert witness Associate Professor Mohd Zin Jusoh (PW4) who examined the site and whose report P6 at p. 28 read as follows:

> The tree fell because of the instability of the tree as a result of disappearing support at the tree base and soil interface. The disappearance of the support was caused by the gradual surface soil run-off as a result (of) repeated washing by rain water flowing along the footpath towards the base of the fallen tree while the tree was still standing.

[5] The professor gave the following reason in arriving at his finding:

> Removal of the soil near the base created a vertical gap between the base of the tree and eroded portion of the soil (see sketch 2). Finally when there was no foundation for the base of the tree to rest on and the exposed root system itself was not strong enough to support the weight of the tree, the tree fell and uprooted itself.

[6] According to him, the location of the tree was critical here. See his report at p. 27 of Ikatan Dokumen-Dokumen where he has drawn the position of the tree. He found (at p. 26 of Ikatan Dokumen-Dokumen) that:

> The land is slightly sloping at the top end of the plot (See sketch) gradually turning into steeper slope towards the road frontage and forming a deep trough (valley-like) which is quite easily visible from the road where the incident occurred. This is an added factor to the above incident.

[7] As for the diseased state of the tree, his report at p. 32 states as follows:

> … on the inspection, I noticed that several large roots snapped forming straight cuts indicating that large exposed roots were weak or rotting at the time of fall.

[8] The plaintiff contends that the defendant ought to have conducted regular examination of the state of the tree on its land which would have revealed that there was erosion at the base of the tree causing it to be unsafe. See evidence of the general manager of defendant Tay Chong Shek (DW1) who merely relied on the grass cutting contractor to maintain the land and no record of maintenance of grass and land was kept. It was submitted, this was inadequate falling short of the standard of care required as decided in *Thean Chew v. The Seaport (Selangor) Rubber Estate Ltd* [1960] 1 LNS 152. In that case, Ong J (as he then was) held that there is a duty to take even the most elementary precaution to prevent danger on the person traveling on the highway approving what *Charlesworth on Negligence*, 3rd edn., at p. 147, said as follows:

> The occupier of land is not liable if a tree, which he did not know, and had no reasonable grounds for knowing, to be unsafe, falls on to the highway and injures a person passing along the highway. His duty is to act as a prudent landowner to prevent his trees which adjoin a highway from being a danger to persons passing along the highway, but he is not bound to call in an expert to examine his trees unless he has reason to believe that they may be unsafe.

[9] See also *Quinn v. Scott And Another* [1965] 2 All ER 588, where the failure of the defendant to cut the tree on its land which was reasonably apparent was not healthy and should have been cut down was held to be negligent when the tree fell across the highway and injured a motorist.

The Defendant's Case

[10] The defendant denied that it was negligent in allowing the said tree to become unstable and diseased as to cause danger to persons using the road.

[11] It attributed the uprooting to the strong wind that blew at the material time.

[12] The general manager of the defendant Tay Chong Shek (DW1) gave evidence to say that he had been maintaining the said plot of land from where the tree fell. A grass cutting contractor had been engaged to tend to the grass and shrubs and ensure that they are cut and their height is maintained at a short level. At cross-examination he said that this was done every three months and he checked on the cutting of the grass and shrubs and also on the condition of the trees and as far as he was concerned no trees were of danger to the public.

[13] The defendant relied on the opinion of its expert Dr. Paramananthan a/l Selliah (DW2) attributing the uprooting of the tree to strong wind which blew on the day of the incident which increased in velocity by a tunneling effect as it swept across the land in question is unconvincing.

[14] This was what he said in his report:

> It is therefore our opinion that on the morning of March 20th 1996, the gust of wind, though not the strongest, blew in the right direction to cause the 'tunnel effect' resulting in the tree to fall and fall in the direction it did across the road. Such an event would have to be an act of God as all conditions must have been right for

A the tree to fall against its normal downslope direction of fall.

[15] The defendant also relied on the general defence of *volenti non fit injuria* on the ground that the plaintiff ought to have known of the danger being at the place of the incident.

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The Law

[16] In order to succeed in negligence the plaintiff is required to prove that:

C i. the defendant owed him a duty of care to ensure his safety;

ii. the defendant breached that duty of care; and

iii. in consequence thereof the plaintiff suffered damages (in the instant case the injury and loss of the plaintiff).

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[17] See *Arab-Malaysian Finance Bhd v. Steven Phoa Cheng Loon & Ors.* [2003] 1 CLJ 585.

[18] See also *Caparo Industries plc v. Dickman & Ors.* [1990] 1 All ER 568 with respect to the criteria whether a duty of care should E be imposed in a particular case as approved and applied in *Arab-Malaysian Finance Bhd, supra*:

> The 3 criteria for imposition of duty of care were foreseeability of damage, proximity of relationship and reasonableness or otherwise F of imposing a duty. In determining whether there was a relationship between the parties, the court guided by situation in which the existence, scope and limit of a duty of care had previously been held to exist rather than by a single general principle would determine whether the particular damage suffered was the kind of damage which the defendant was under the duty to prevent and G whether there were circumstances from which the court could pragmatically conclude that the duty existed.

The Probable Cause Of The Uprooting Of The Tree

H **[19]** Of the two experts who gave evidence I would accept the evidence of Associate Professor Mohd Zin Jusoh (PW4) on the probable cause of uprooting of the tree which fell on the plaintiff on the following grounds.

[20] Although Associate Professor Mohd Zin Jusoh's examination I of the tree at the site was conducted some ten months after the event, he was still able to observe the condition of the soil

surrounding the base of the tree. He was able to identify the uprooted tree in question and to draw up and take pictures of the area. He was able to identify the tree as a Batai tree whose height at maturity would reach 80 to 100 feet. This was what he said (at p. 28 of Ikatan Dokumen-Dokumen) of his report:

> The inspection clearly revealed that the tree fell because of the instability of the tree as a result of disappearing support at the tree-base and soil interface. The disappearance of the support was caused by the gradual surface soil run-off as a result (of) repeated washing by rain water flowing along the footpath towards the base of the fallen tree while the tree was still standing. It was also noticed that one of main branch was dead at the time of the tree fell by itself, indicating the unhealthy condition of the tree at that time.
>
> Removal of the soil near the base created a vertical gap between the base of the tree and eroded portion of the soil. (See sketch 2).
>
> Finally when there was no foundation for the base of the tree to rest on and the exposed root system itself was not strong enough to support the weight of the tree, the tree fell and uprooted itself. The tree can be said to be overmature and some parts were weakening leading to the deterioration of growth functions of the tree.

[21] On the contrary all that Dr. S. Paramananthan relied upon to show the existence of such a strong wind was the climatic data which he obtained from Jabatan Perkhidmatan Kajicuaca, Petaling Jaya, which indicated that on the day of the incident the wind was blowing over the state of Selangor at a mean speed of 0.8 meters per second on 20 March 1996. His postulation flies in the face of the other much higher mean speed on the days preceding the incident.

Did The Defendant Owe A Duty Of Care To The Plaintiff?

[22] The case of *Thean Chew v. The Seaport (Selangor) Rubber Estate Ltd* [1960] 1 LNS 152 is good authority on the duty of care required of the owner of the land to properly manage a tree and take precaution to prevent danger to persons using the highway in case the tree should fall. Assuming that the area of the land at the root of the tree had eroded as I had found there could be no difficulty for me to find the defendant negligent. Having accepted the probable cause of the uprooting as described by the plaintiff's

A expert Associate Professor Mohd Zin Jusoh, there was clearly a duty on the part of the defendant to ensure that there was no such erosion at the base of the tree so much as to affect the integrity of its firmness and implantation to the ground. It is clear that there was a failure on the part of the defendant to properly
B inspect the condition of the trees on its land on an orderly basis. Had that been done the erosion could have been detected and such preventive measures where necessary taken.

[23] The defence of act of God by reason of the exceptionally
C strong wind as postulated by Dr. S. Paramananthan, even if it is true would not be available to the defendant in its case given that the uprooting was caused by the defendant's failure to prevent erosion.

D **[24]** But the plaintiff in this case was not an ordinary and legitimate user of the road for the purpose of travel as a motorist or passerby would. He was using that part of the road to park his van from where he would sell his vegetables on a daily basis. He was struck by the fallen tree (by his own account) after he had
E finished selling and was going into the van to drive off. It would be most unreasonable to find that a duty of care exists on the part of the landowner under the circumstances to ensure that the tree would not fall at any point in time while the plaintiff conducted his business. It would not satisfy the reasonableness test in *Caparo*
F *Industries* case, *supra*.

[25] Quite apart from an absence of a duty of care, the separate defence of *volenti non fit injuria* should be available to the defendant. A person who habitually parks himself in an area where high trees abound ought to be aware and to know that there is always a
G danger that a tree may fall on him at any given time. By continuing to sell his vegetables from his van at the same place on a regular basis the plaintiff is to be taken as having assumed such a risk.

H **The Plaintiff's Action In Negligence Therefore Fails**

The Claim In Nuisance

[26] Apply the principle in *Wu Siew Ying v. Gunung Tunggal Quarry*

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& Construction Sdn Bhd & Ors [1999] 4 CLJ 339 the paragraph Has The Plaintiff A Cause Of Action In Nuisance?

[27] Nuisance is a cause of action in English common law and the common law to be applied is the law of England and under s. 3 of the Civil Law Act 1956 the common law that has to be applied in this country is that which is understood and accepted as the common law of England before 7 April 1956.

[28] Under the common law then obtaining, nuisance with respect to the use of land may be broadly defined, as an act or omission which is an interference with, disturbance of or annoyance, to a person in the exercise or enjoyment of his ownership or occupation of land or of some easement, profit or other rights used or enjoyed in connection with land.

[29] Until the decision of *Leakey and Others v. National Trust for Places of Historic Interest or Natural Beauty* [1980] 1 All ER 17 a harm originating in some natural condition of land and not the effect of human activity was not generally actionable as a nuisance.

[30] It is clear the nuisance complained of in the instant case arose from a natural user of land as it was not subjected to any use or activities. The following paragraph from the 1995 17th edn of *Clerk & Lindsell on Tort* at para. 18-17 clarifies the point:

> Natural Nuisance – It used to be thought that harm originating in some natural condition of land and not the effect of human activity was not generally actionable as a nuisance, and certain older cases indicated that this indeed was the law. But in recent times the judges have extended the boundaries of nuisance to include such natural nuisances. In *Goldman v. Hargraves the Judicial Committee* of the Privy Council held that an occupier of Land in Australia to be under a duty of care to abate a fire which had started by lightning striking a tree on his land and which spread to his neighbour's land. It was recognised that the law on this question was not static and that the decision represented a step in extending the responsibilities of landowners towards their neighbours, Lord Wilberforce saying, "It is only in comparative recent times that the law has recognised an occupier's duty as one of a more positive character than merely to abstain from creating or adding to, a source of danger or annoyance." The development was taken a large step further by the Court of Appeal in *Leakey v. National Trust.* The National Trust owned a natural hill in Somerset which by natural forces slipped so as to damage the plaintiff's contiguous property. It was argued for the Trust that there could be no liability for such accidents of

A nature, and also that if there was any liability it sounded only in negligence and not in nuisance.

For the foregoing reason the plaintiff's claim in nuisance must therefore fail.

B The plaintiff's claim is dismissed with costs.

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